

FIRST REGULAR SESSION

# SENATE BILL NO. 655

94TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR LAGER.

Read 1st time March 1, 2007, and ordered printed.

TERRY L. SPIELER, Secretary.

2459S.011

## AN ACT

To repeal section 407.025, RSMo, and to enact in lieu thereof two new sections relating to merchandising practices.

*Be it enacted by the General Assembly of the State of Missouri, as follows:*

Section A. Section 407.025, RSMo, is repealed and two new sections  
2 enacted in lieu thereof, to be known as sections 407.015 and 407.025, to read as  
3 follows:

**407.015. 1. In pertinent cases, the courts shall be guided by the  
2 policies of the Federal Trade Commission and interpretations given by  
3 the Federal Trade Commission and the federal courts of Section 5(a)(1)  
4 of the Federal Trade Commission Act, 15 U.S.C. Section 45(a)(1), as  
5 amended.**

**6 2. This section shall not apply to actions or transactions  
7 otherwise permitted or approved by the Federal Trade Commission or  
8 any other regulatory body or officer acting under statutory authority  
9 of this state or the United States.**

407.025. 1. Any person who purchases or leases merchandise primarily  
2 for personal, family or household purposes and thereby suffers an ascertainable  
3 loss of money or property, real or personal, as a result of the use or employment  
4 by another person of a method, act or practice declared unlawful by section  
5 407.020, may bring a private civil action in either the circuit court of the county  
6 in which the seller or lessor resides or in which the transaction complained of  
7 took place, to recover [actual damages] **actual out-of-pocket loss. The term  
8 "out-of-pocket loss" shall mean an amount of money equal to the  
9 difference between the amount paid by the consumer for the good or**

**EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.**

10 service and the actual market value of the good or service that the  
11 consumer actually received. In order to recover damages in an  
12 individual action under this section, each person shall be required to  
13 prove that the method, act, or practice declared unlawful by section  
14 407.020 caused him or her to enter into the transaction that resulted in  
15 his or her damages. The court may, in its discretion, award punitive damages  
16 [and]. The court may, in its discretion, award to the prevailing party  
17 attorney's fees, based on the amount of time reasonably expended, and may  
18 [provide such equitable relief as it deems necessary or proper] **enjoin the**  
19 **methods, acts, or practices declared unlawful by section 407.020.**

20           2. Persons entitled to bring an action pursuant to subsection 1 of this  
21 section may, if the unlawful method, act or practice has caused similar injury to  
22 numerous other persons, institute an action as representative or representatives  
23 of a class against one or more defendants as representatives of a class, and the  
24 petition shall allege such facts as will show that these persons or the named  
25 defendants specifically named and served with process have been fairly chosen  
26 and adequately and fairly represent the whole class, to recover damages as  
27 provided for in subsection 1 of this section. The plaintiff shall be required to  
28 prove such allegations, unless all of the members of the class have entered their  
29 appearance, and it shall not be sufficient to prove such facts by the admission or  
30 admissions of the defendants who have entered their appearance. **In order to**  
31 **recover damages in a class action under this section, each class member**  
32 **shall be required to prove that the method, act, or practice declared**  
33 **unlawful in section 407.020 caused the class member to enter into the**  
34 **transaction that resulted in his or her damages.** In any action brought  
35 pursuant to this section, the court may in its discretion [order, in addition to  
36 damages, injunction or other equitable relief and] **enjoin the methods, acts,**  
37 **or practice declared unlawful by section 407.020. The court may also**  
38 **determine a proposed award of reasonable attorney's fees for the counsel**  
39 **to the class.**

40           3. An action may be maintained as a class action in a manner consistent  
41 with Rule 23 of the Federal Rules of Civil Procedure and Missouri rule of civil  
42 procedure 52.08 to the extent such state rule is not inconsistent with the federal  
43 rule if:

- 44           (1) The class is so numerous that joinder of all members is impracticable;
- 45           (2) There are questions of law or fact common to the class;
- 46           (3) The claims or defenses of the representative parties are typical of the  
47 claims or defenses of the class; and

48 (4) The representative parties will fairly and adequately protect the  
49 interests of the class; and, in addition

50 (5) The prosecution of separate action by or against individual members  
51 of the class would create a risk of:

52 (a) Inconsistent or varying adjudications with respect to individual  
53 members of the class which would establish incompatible standards of conduct for  
54 the party opposing the class; or

55 (b) Adjudications with respect to individual members of the class which  
56 would as a practical matter be dispositive of the interests of the other members  
57 not parties to the adjudications or substantially impair or impede their ability to  
58 protect their interests; or

59 (6) The party opposing the class has acted or refused to act on grounds  
60 generally applicable to the class, thereby making appropriate final injunctive  
61 relief or corresponding declaratory relief with respect to the class as a whole; or

62 (7) The court finds that the questions of law or fact common to the  
63 members of the class predominate over any questions affecting only individual  
64 members, and that a class action is superior to other available methods for the  
65 fair and efficient adjudication of the controversy. The matters pertinent to the  
66 findings include:

67 (a) The interest of members of the class in individually controlling the  
68 prosecution or defense of separate actions;

69 (b) The extent and nature of any litigation concerning the controversy  
70 already commenced by or against members of the class;

71 (c) The desirability or undesirability of concentrating the litigation of the  
72 claims in the particular forum;

73 (d) The difficulties likely to be encountered in the management of a class  
74 action.

75 4. (1) As soon as practicable after the commencement of an action brought  
76 as a class action, the court shall determine by order whether it is to be so  
77 maintained. An order pursuant to this subdivision may be conditional, and may  
78 be altered or amended before the decision on the merits. **An order permitting**  
79 **a class action shall specifically state how the class claims and any**  
80 **issues affecting only individual members, raised by the claims or**  
81 **defenses asserted in the pleadings, shall be tried in a manageable, time-**  
82 **efficient manner.**

83 (2) In any class action maintained pursuant to subdivision (7) of  
84 subsection 3 of this section, the court shall direct to the members of the class the  
85 best notice practicable under the circumstances, including individual notice to all

86 members who can be identified through reasonable effort. The notice shall advise  
87 each member that:

88 (a) The court will exclude such member from the class if such member so  
89 requests by a specified date;

90 (b) The judgment, whether favorable or not, will include all members who  
91 do not request exclusion; and

92 (c) Any member who does request exclusion may, if such member desires,  
93 enter an appearance through such member's counsel.

94 (3) **Prior to the entry of a judgment against a defendant in an**  
95 **action maintained as a class action under subsection 3 of this section,**  
96 **the court shall require each member of the class who claims to be**  
97 **entitled to monetary relief to submit a statement in a form prescribed**  
98 **by the court requesting a specific dollar amount and providing**  
99 **information regarding the nature of his or her loss, injury, claim, or**  
100 **damage. No award of damages under this section shall be made without**  
101 **proof that the person or persons seeking damages suffered an actual**  
102 **out-of-pocket loss. No judgment shall be entered until the trier of fact**  
103 **has determined the amount of money, if any, owed to each class**  
104 **member based on his or her individual proof. The amount of the**  
105 **judgment shall not exceed the sum of the money owed to each class**  
106 **member. The judgment shall identify each member of the class and his**  
107 **or her individual monetary award.** The judgment in an action maintained  
108 as a class action pursuant to subdivision (5) of subsection 3 of this section or  
109 subdivision (6) of subsection 3 of this section, whether or not favorable to the  
110 class, shall include and describe those whom the court finds to be members of the  
111 class. The judgment in an action maintained as a class action pursuant to  
112 subdivision (7) of subsection 3 of this section, whether or not favorable to the  
113 class, shall include and specify or describe those to whom the notice provided in  
114 subdivision (2) of this subsection was directed, and who have requested exclusion,  
115 and whom the court finds to be members of the class.

116 (4) When appropriate **in a case that otherwise meets the class**  
117 **action requirements of subsection 3 of this section,** an action may be  
118 brought or maintained as a class action with respect to particular issues, or a  
119 class may be divided into subclasses and each subclass treated as a class, and the  
120 provisions of this section shall then be construed and applied accordingly.

121 5. In the conduct of actions to which this section applies, the court may  
122 make appropriate orders:

123 (1) Determining the course of proceedings or prescribing measures to

124 prevent undue repetition or complication in the presentation of evidence or  
125 argument;

126 (2) Requiring, for the protection of the members of the class or otherwise  
127 for the fair conduct of the action, that notice be given in such manner as the court  
128 may direct to some or all of the members of any step in the action, or of the  
129 proposed extent of the judgment, or of the opportunity of members to signify  
130 whether they consider the representation fair and adequate, to intervene and  
131 present claims or defenses, or otherwise to come into the action;

132 (3) Imposing conditions on the representative parties or on intervenors;

133 (4) Requiring that the pleadings be amended to eliminate therefrom  
134 allegations as to representation of absent persons, and that the action proceed  
135 accordingly;

136 (5) Dealing with similar procedural matters.

137 6. A class action shall not be dismissed or compromised without the  
138 approval of the court, and notice of the proposed dismissal or compromise shall  
139 be given to all members of the class in such manner as the court directs.

140 7. Upon commencement of any action brought pursuant to subsection 1  
141 of this section, the plaintiff or plaintiffs shall inform the clerk of the court in  
142 which such action is brought, on forms to be provided by such clerk, that the  
143 action is brought pursuant to this section. The clerk of the court shall forthwith  
144 inform the attorney general of the commencement of such action, together with  
145 a copy of the complaint or other initial pleading, and, upon entry of any judgment  
146 or decree in the action, the clerk shall mail a copy of such judgment or decree to  
147 the attorney general.

148 8. Any permanent injunction, judgment or order of the court made  
149 pursuant to section 407.100 shall be prima facie evidence in an action brought  
150 pursuant to this section that the respondent used or employed a method, act or  
151 practice declared unlawful by section 407.020.

152 **9. This section shall apply to all claims pending or filed on or**  
153 **after August 28, 2007.**

✓